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## A JOURNEY INTO THE UNKNOWN: PRETRIAL PUBLICITY AND CAPITAL CASES

Marla Sandys\*  
Steven M. Chermak\*

*This article examines issues related to pretrial publicity's role in the free press-fair trial debate. First, the article provides a comprehensive review of existing research examining the effects of pretrial publicity on case outcomes. Second, it examines the presentation of prejudicial publicity items in a sample of newspaper stories on capital cases, identifying the types of factual and emotional publicity presented and suggesting areas that need to be more closely scrutinized in future research. The article concludes that cases that ultimately result in sentences of death receive both more and different types of pretrial publicity than cases that result in lesser sentences. The current state of empirical pretrial publicity knowledge, and the presentation of death cases, are discussed as they relate to the balancing of First and Sixth amendment rights.*

Free press versus fair trial is one of the more contentious debates in the overlapping areas of mass communication and law. For example, the American Bar Association (ABA) has had difficulties establishing a consistent set of standards to ensure a proper balance between the rights of free press and fair trial.<sup>1</sup> During the last 30

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<sup>1</sup>See AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL, FREE PRESS (3d ed. 1992).

years, the ABA has convened three separate committees in attempts to develop standards that safeguard the rights of defendants while not infringing on those of the news media. The first committee, the ABA Project on Minimum Standards for Criminal Justice, Fair Trial, and Free Press,<sup>2</sup> convened in 1966 and issued its report after the Supreme Court of the United States' decision in *Sheppard v. Maxwell*.<sup>3</sup> This first set of standards elevated the defendant's right to a fair trial.<sup>4</sup> A second ABA committee, convened in 1978, promulgated standards that shifted the balance back in favor of the news media.<sup>5</sup> In 1992, a third set of standards was generated. "This third reformulation of the standards ... reflects the accumulated experience over three decades within the ABA of attempting to harmonize two sets of interests which are not only in perpetual conflict but also individually within a constant state of expansion."<sup>6</sup>

Pretrial publicity is one issue at the crux of the conflict between free press and fair trial. Courts depend on the sanctity of the jury system to protect defendants from adverse pretrial publicity. Does sensational pretrial coverage prevent the selection of fair and impartial jurors? Do court remedies protect fair trial rights? Do these remedies undermine the effectiveness of the news media? The ability to answer these questions precisely is limited because of gaps in the empirical literature on the effects of pretrial publicity.

Early scholarly interest in this area was stimulated in the 1960s in response to celebrated examples of media overzealousness. First, Sam Sheppard's 1954 conviction for murdering his pregnant wife in a Cleveland suburb was appealed on pretrial publicity issues. News coverage of Sheppard's trial had a direct impact on the verdict, said the Supreme Court, and the trial judge "did not fulfill his duty to protect the defendant from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom."<sup>7</sup> The Court ruled in Sheppard's favor on pretrial publicity grounds, remanding his case. After a second trial, Sheppard was acquitted.<sup>8</sup>

<sup>2</sup>American Bar Association Project on Minimum Standards for Criminal Justice Relating to Fair Trial and Free Press (Approved Draft 1968).

<sup>3</sup>*Sheppard v. Maxwell*, 384 U.S. 333 (1966).

<sup>4</sup>AMERICAN BAR ASSOCIATION, *supra* note 1, at xi.

<sup>5</sup>AMERICAN BAR ASSOCIATION, STANDARDS RELATIVE TO FAIR TRIAL AND FREE PRESS (2d ed. 1978).

<sup>6</sup>AMERICAN BAR ASSOCIATION, *supra* note 1 at xi.

<sup>7</sup>*Sheppard v. Maxwell*, 384 U.S. at 363.

<sup>8</sup>*See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

Another celebrated example that helped stir interest in pretrial publicity was news coverage of the events subsequent to President John Kennedy's assassination. His assassination, the murder of Lee Harvey Oswald and the trial of Jack Ruby provided stages for sensational media coverage. After its inquiry into these events, the Warren Commission declared: "Neither the press nor the public had a right to be contemporaneously informed by the police or prosecuting authorities of the details of the evidence being accumulated against Oswald. Undoubtedly the public was interested in these disclosures, but its curiosity should not have been satisfied at the expense of the accused's right to a trial by an impartial jury."<sup>9</sup>

The sensational news coverage of these cases helped season the free press-fair trial issue for empirical examination. Since the mid-1960s, 30 studies using various research methods have addressed pretrial publicity questions. This literature has evolved along three important lines of inquiry. First, researchers have attempted to document the general effects of pretrial publicity. Does pretrial publicity affect jury decisions? Second, researchers have tested the impact of specific prejudicial factors. Third, researchers have considered whether procedural safeguards, such as judicial instructions or continuances, mediate the effects of pretrial publicity.

This article makes three contributions to the free press-fair trial debate. First, it provides a review of existing empirical knowledge of the effects of pretrial publicity, highlighting "what we know" and "what we need to know." John Carroll and his colleagues influenced the direction of research examining pretrial publicity in 1986 with their comprehensive literature review.<sup>10</sup> Current empirical knowledge remains inconclusive, however, limiting the ability of this literature to inform this debate.<sup>11</sup> We have organized our review of the literature by the three areas noted above. First, the article discusses the results from research examining the general effects of pretrial publicity. Second, it documents the types of prejudicial news items considered and determines what items have been found to have an effect. Third, the article discusses studies that examined whether various court remedies mediated the impact of the publicity considered.

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<sup>9</sup>REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY 239-40 (1964).

<sup>10</sup>John S. Carroll et al., *Free Press and Fair Trial: The Role of Behavioral Research*, 10 LAW & HUMAN BEHAV. 187, 192 (1986).

<sup>11</sup>See Roger W. Davis, *Pretrial Publicity, the Timing of the Trial, and Mock Jurors' Decision Processes*, 16 J. APPLIED SOC. PSYCHOL. 590 (1986).

Second, this article documents the frequency which specific prejudicial factors, such as prior criminal record and forensic test results, are presented in newspaper crime stories. Specifically, the article examines a sample of pretrial articles from capital murder cases that ended in a defendant's conviction. It compares the presentation of prejudicial information in cases in which a capital murder defendant was convicted and sentenced to death with cases in which the convicted defendant was given a lesser sentence. General research interest in the presentation of crime in the news media has increased dramatically in the last two decades,<sup>12</sup> producing several patterns: depictions of serious violent crime predominates in print and electronic media,<sup>13</sup> the presentation of crime in the media is inversely related to official reports of crime<sup>14</sup> and demographic characteristics of victims and defendants can influence the presentation of crime.<sup>15</sup> This research, however, has overlooked the presentation of pretrial publicity. Only one content study has tried to pinpoint this presentation. James Tankard and others examined 29 newspapers and found that prejudicial information was mentioned in 68 percent of the crime stories presented.<sup>16</sup> Confessions, prior criminal records and opinions about the defendant's guilt were the prejudicial factors most frequently presented. The article expands on this research by comparing the types and frequency of prejudicial information presented in a sample of capital murder news stories.

The authors first test whether cases that result in a death sentence receive more pretrial coverage than cases that end with a lesser punishment. Second, they test whether newspaper articles examining cases that ultimately result in death sentences will include more factual and emotional prejudicial news items than cases that end in a lesser punishment. Specifically, the article looks

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<sup>12</sup>See Harry L. Marsh, *Crime and the Press: Does Newspaper Crime Coverage Support Myths about Crime and Law Enforcement?* (1988) (unpublished Ph.D. dissertation, Sam Houston State University (Huntsville, Tex.)).

<sup>13</sup>See, e.g., STEVEN M. CHERMAK, *VICTIMS IN THE NEWS: CRIME IN AMERICAN NEWS MEDIA* (1995); RICHARD V. ERICSON ET AL., *REPRESENTING ORDER: CRIME, LAW, AND JUSTICE IN THE NEWS MEDIA* (1991); DORIS GRABER, *CRIME NEWS AND THE PUBLIC* (1980).

<sup>14</sup>See, e.g., Marsh, *supra* note 12; Drew Humphries, *Serious Crime, News Coverage, and Ideology: A Content Analysis of Crime Coverage in a Metropolitan Paper*, 27 *CRIME & DELINQUENCY* 191 (1981).

<sup>15</sup>See CHERMAK, *supra* note 13.

<sup>16</sup>James W. Tankard et al., *Compliance with American Bar Association Fair Trial-Free Press Guidelines*, 56 *JOURNALISM Q.* 464 (1979).

at whether aggravating factors will be more likely to be presented in articles about cases that end in death sentences and mitigating factors are more likely to be presented in articles about cases that end with a lesser punishment. In addition, the article examines whether negative factual items, such as reporting a suspect's confession or prior criminal record, test results, witness information, statements on the strength of evidence, statements about guilt, statements about the sentence, and escape and security concerns, will be presented primarily in articles about death cases. Finally, the authors test whether emotional news items, such as the number of wounds reported, the location of wounds, descriptions of the victim's body, negative character statements, community sentiment, the impact of crime on the survivors and family information, are more likely to be presented in articles about death cases than articles about cases that ended in a lesser punishment.

Third, most research has concentrated on proving the prejudicial effects of negative factual prejudicial publicity. Existing research has established that prior record, confessions and inadmissible evidence are influential prejudicial factors.<sup>17</sup> Numerous other factual prejudicial factors, cited as being of concern by the ABA,<sup>18</sup> have not been examined. Moreover, "researchers have not generally attempted to separate or compare the effects of different types of pretrial publicity. As a result, little is known about what types of pretrial publicity are more, or less, likely to bias potential jurors."<sup>19</sup> For example, the few studies that have considered emotional news material have highlighted the need to consider different types of emotional impact. This article reports the frequency in which various prejudicial factors are presented in the news. The analysis will help pinpoint factors that need to be closely examined in future experimental research.

## DOES PRETRIAL PUBLICITY AFFECT JURY DECISIONS?

Table 1 presents a list of studies examining the general effects of pretrial publicity.<sup>20</sup> Twenty-three of these studies have been

<sup>17</sup>See research cited *infra* notes 48–60.

<sup>18</sup>See AMERICAN BAR ASSOCIATION, *supra* note 1.

<sup>19</sup>Amy L. Otto et al., *The Biasing Impact of Pretrial Publicity on Juror Judgments*, 18 LAW & HUMAN BEHAV. 453, 456 (1994).

<sup>20</sup>We review pretrial publicity studies published after 1965. We did not find any empirical evaluations of pretrial publicity published before 1966. To make the

**TABLE 1: RESEARCH EXAMINING PRETRIAL PUBLICITY: IS PRETRIAL PUBLICITY PREJUDICIAL?<sup>a</sup>**

Yes (N = 21)	No (N = 9)
Simon (1966) <sup>b</sup>	Kline & Jess (1966) <sup>c</sup>
Tans & Chaffee (1966)	Simon & Eimermann (1971)
Hoiberg & Stires (1973) <sup>d</sup>	Robinson (1974)
Riley (1973)	Rollings & Blascovich (1977)
Sue et al. (1973)	Simon (1980) <sup>e</sup>
Padawer-Singer et al. (1974)	Roper (1981)
Sue & Smith (1974)	Davis (1986)
Sue et al. (1974)	Kramer et al. (1990) <sup>f</sup>
Padawer-Singer & Barton (1975)	Kerr et al. (1991) <sup>f</sup>
Sue et al. (1975)	
Padawer-Singer et al. (1977)	
Hvistendahl (1979)	
Constantini & King (1981)	
Nietzel & Dillehay (1983)	
Greene & Loftus (1984)	
Greene & Wade (1988)	
Kramer & Kerr (1989)	
Moran & Cutler (1991)	
Dexter et al. (1992)	
Ogloff & Vidmar (1994)	
Otto et al. (1994)	

<sup>a</sup>Research studies presented by year of publication.  
<sup>b</sup>No effect, however, after judicial admonishment.  
<sup>c</sup>One of four juries examined based verdict on prejudicial news story.  
<sup>d</sup>No effect for male subjects.  
<sup>e</sup>This study summarizes the materials discussed in the Simon and Eimermann (1971) article.  
<sup>f</sup>No effect on predeliberation verdicts, but an effect on jury verdicts after deliberations.

completed by psychologists examining pretrial effects with experimental research designs. Seven other studies have examined this issue using survey questionnaires.

The American Bar Association concluded after its third attempt to reform free press-fair trial standards that “recent behavioral

number of studies manageable, we also limited our review to those studies published in books and academic journals, excluding unpublished manuscripts. Studies that survived the rigors of refereed publication seem to be representative of the best research examining this issue. We have given equal value to the results despite methodological limitations of some of the research, presenting an overview of the current state of empirical knowledge in this area.

science studies have ... supported the view that pretrial publicity does not have either the profound or the pervasive impact it was once presumed to have."<sup>21</sup> Court professionals echo this belief that pretrial publicity has minimum impact on trial outcomes. Researchers who interviewed judges, defense attorneys, prosecutors, media attorneys, law professors and journalists about their attitudes on the effects of pretrial publicity found that the parties surveyed thought the effects of pretrial publicity were exaggerated; that prior record, confessions and inadmissible evidence were most prejudicial; and that the preventive remedies in place, such as *voir dire* and change of venue, effectively reduced prejudicial impact.<sup>22</sup>

The results presented in Table 1 indicate that nine of the 30 empirical studies provide support for the conclusion that pretrial publicity is not prejudicial. Of these nine studies, five used experimental designs. For example, Roger Davis<sup>23</sup> tested the effects of pretrial publicity on individual and group verdicts. Fictitious news articles were read by 224 undergraduate students acting as mock jurors. The stories implied the defendant's guilt by including information about prior record, opportunity to dispose of damaging information and character, although the author claimed that "the tone of the articles was factual and nonsensational."<sup>24</sup> Subjects then viewed a 40-minute videotaped trial immediately or one week following exposure to this publicity. The results from this research indicated that "jury verdicts and individual juror measures revealed considerable resistance to the influence of prejudicial news."<sup>25</sup> Mock jurors exposed to the prejudicial publicity did not differ on conviction rate, deliberation length or quality of deliberations when compared with subjects not exposed to the prejudicial publicity. Davis hypothesized that the mock jurors exposed to prejudicial publicity might have perceived the slanted news as a threat and overcompensated in response.

An experimental study by F. Gerald Kline and Paul Jess<sup>26</sup> indicated that three of four mock juries exposed to prejudicial news stories did not use this information because of pressure from the group.

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<sup>21</sup>AMERICAN BAR ASSOCIATION, *supra* note 1, at 8.

<sup>22</sup>See Carroll et al., *supra* note 10.

<sup>23</sup>Davis, *supra* note 11.

<sup>24</sup>*Id.* at 593.

<sup>25</sup>*Id.* at 601.

<sup>26</sup>F. Gerald Kline & Paul H. Jess, *Prejudicial Publicity: Its Effects on Law School Mock Juries*, 43 JOURNALISM Q. 113 (1966).



Similarly, Geoffrey Kramer and others<sup>27</sup> and Norbert Kerr and others<sup>28</sup> found that prejudicial publicity did not affect individual decisions prior to deliberation, although it did have a biasing effect on group verdicts and individuals' postdeliberation verdict preferences.

Finally, an experimental study by Robert Roper<sup>29</sup> used a mock-trial simulation to test the effects of inadmissible evidence and sensational news accounts of a case. This research is an important contribution to the pretrial publicity research because the sample of nearly 1,000 subjects was selected from actual jury rolls. Roper found that there was "no significant relationship between a jury's exposure to either types of pretrial publicity and its verdict."<sup>30</sup>

Other studies have documented the effects of pretrial publicity using survey research, testing the memories of potential jurors in regard to actual cases. In these studies, researchers question individuals who live in communities saturated by news coverage of a high-profile case. Some of this research that monitors public reactions to specific cases has found that the community members surveyed report they would be fair and impartial.<sup>31</sup> For example, Henry Rollings and Jim Blascovich<sup>32</sup> surveyed psychology students about the Patty Hearst case. They questioned students prior to a great increase in publicity and then after three weeks of sensational coverage. The authors found no significant differences when comparing the two sets of responses, concluding that "pretrial publicity may not influence public opinion in a criminal case to the extent that some believe."<sup>33</sup> In another study, Rita Simon and Thomas Eimermann found that 80 percent of the population surveyed had knowledge of two defendants on trial for beating a man to death with golf

<sup>27</sup>Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUMAN BEHAV. 409 (1990).

<sup>28</sup>Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665 (1991).

<sup>29</sup>Robert T. Roper, *The Gag Order: Asphyxiating the First Amendment*, 34 W. POL. Q. 372 (1981).

<sup>30</sup>*Id.* at 384.

<sup>31</sup>See, e.g., Harry E. Rollings & Jim Blascovich, *The Case of Patricia Hearst: Pretrial Publicity and Opinion*, 27 J. COMM. 58 (1977); Michael J. Robinson, *The Impact of the Televised Watergate Hearings*, 24 J. COMM. 17 (1974); Rita J. Simon & Thomas Eimermann, *The Jury Finds Not Guilty: Another Look at Media Influence on the Jury*, 48 JOURNALISM Q. 343 (1971).

<sup>32</sup>Rollings & Blascovich, *supra* note 31.

<sup>33</sup>*Id.* at 65. Other researchers have noted that Rollings and Blascovich's conclusions may be biased because there was already a great deal of publicity before their

clubs.<sup>34</sup> Despite the high recognition of this case, the defendant who went to trial was acquitted.<sup>35</sup>

However, Table 1 indicates that the majority of research supports the conclusion that pretrial publicity does have an impact on a defendant's right to a fair trial. Summarizing the results of this research, Kerr and others stated that "the empirical literature on this question, although inconclusive, does indicate that many types of prejudicial publicity can affect public opinion and juror sentiment."<sup>36</sup>

Mary Tans and Steven Chaffee<sup>37</sup> presented positive evidence (favorable statements by an attorney, a statement by the defendant denying he committed the crime or information that the defendant was released pending trial) or negative evidence (unfavorable statements by an attorney, a confession by the defendant or information that the defendant was arrested) to a number of different news consumers, including undergraduate students, PTA members, clerical and professional employees and female members of a steel workers' auxiliary. They found that perceptions of guilt increased in proportion to the number of unfavorable elements in a news story, and, if the publicity presented were favorable, subjects were significantly more likely to think that a defendant was not guilty.<sup>38</sup>

Three pretrial publicity studies were published in the mid-1970s as a result of the Free Press-Fair Trial Project.<sup>39</sup> The professed strength of these studies was the examination of the prejudicial effects of confession and prior record prejudice on subjects from actual jury pools. Subjects listened to a three-hour audio tape of an actual case before deliberating as jurors. Juries exposed to such prejudicial information were significantly more likely to

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first survey of this case, inflating baseline knowledge about the case. See e.g., Carroll et al., *supra* note 10, at 191.

<sup>34</sup>Simon & Eimermann, *supra* note 31, at 344.

<sup>35</sup>*Id.* The results of this study also are presented in RITA J. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* (1980).

<sup>36</sup>Kerr et al., *supra* note 28, at 667.

<sup>37</sup>Mary D. Tans & Steven H. Chaffee, *Pretrial Publicity and Juror Prejudice*, 43 JOURNALISM Q. 647 (1966).

<sup>38</sup>*Id.* at 651-52.

<sup>39</sup>Alice M. Padawer-Singer et al., *Legal and Social-Psychological Research in the Effects of Pretrial Publicity on Juries, Numerical Makeup of Juries, Non-Unanimous Verdict Requirements*, 3 LAW & PSYCHOL. REV. 71 (1977); Alice M. Padawer-Singer & Allen H. Barton, *Impact of Prejudicial Publicity on Jurors' Verdicts*, in *THE JURY SYSTEM: A CRITICAL OVERVIEW* 123 (Rita J. Simon ed., 1975); Alice M. Padawer-Singer et al., *Voir Dire by Two Lawyers: An Essential Safeguard*, 57 JUDICATURE 386 (1974).

render guilty verdicts than were juries not so exposed. Similarly, two other experimental studies, reporting results from four experiments, found that pretrial publicity can have a general effect on jury decision-making processes.<sup>40</sup>

Finally, contrary to the survey research cited previously, some researchers have found that potential jurors in real cases did have strong prejudgments of guilt because of pretrial publicity.<sup>41</sup> One researcher surveyed public opinion in three cities about Jeffrey MacDonald's case, an Army Green Beret captain charged with killing his wife and two daughters.<sup>42</sup> Sam Riley found that publicizing that a person was suspected of a crime produced bias, although respondents did not admit to being prejudiced.<sup>43</sup>

Gary Moran and Brian Cutler surveyed public opinion about a drug and murder case in two separate tests of community prejudgment and asked questions about media use, perceptions of guilt and the ability to be fair and impartial. Their survey results indicated that awareness of these cases was high, knowledge of each case corresponded with estimations of the defendant's guilt and those surveyed thought they could be fair and impartial.<sup>44</sup> Similarly, Edward Constantini and Joel King tested whether the effects of pretrial publicity on potential jurors in two high-profile cases remained after controlling for demographic characteristics and general attitudes about crime, concluding, "While other factors may be associated with a potential juror's propensity to prejudice, pretrial information is easily the most serious cause."<sup>45</sup>

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<sup>40</sup>Edith L. Greene & Russell Wade, *Of Private Talk and Public Print: General Pretrial Publicity and Juror Decision-making*, 2 APPLIED COGNITIVE PSYCHOL. 123 (1988); Edith L. Greene & Elizabeth F. Loftus, *What's New in the News? The Influence of Well-Publicized News Events on Psychological Research and Courtroom Trials*, 5 BASIC & APPLIED SOC. PSYCHOL. 211 (1984).

<sup>41</sup>See Gary Moran & Brian L. Cutler, *The Prejudicial Impact of Pretrial Publicity*, 21 J. APPLIED SOC. PSYCHOL. 345 (1991); Michael T. Nietzel & Ronald C. Dillehay, *Psychologists as Consultants for Changes of Venue: The Use of Public Opinion Surveys*, 7 LAW & HUMAN BEHAV. 309 (1983); Edward Constantini & Joel King, *The Partial Juror: Correlates and Causes of Prejudgment*, 15 LAW & SOC. REV. 9 (1980); Sam G. Riley, *Pretrial Publicity: A Field Study*, 50 JOURNALISM Q. 17 (1973).

<sup>42</sup>Riley, *supra* note 41.

<sup>43</sup>*Id.* at 23.

<sup>44</sup>Moran & Cutler, *supra* note 41.

<sup>45</sup>Constantini & King, *supra* note 41, at 38.

## WHAT INFORMATION PREJUDICES THE JURY?

Research has also attempted to identify the effects of specific types of prejudicial information. The different prejudicial factors of concern examined in past research are presented in Table 2. The ABA provided an "illustrative list" of factors thought to have a substantial likelihood of prejudicing criminal proceedings.<sup>46</sup> Table 2 includes the ABA factors tested in previous research, the ABA factors not tested and other factors tested because researchers thought them to be problematic.<sup>47</sup> Table 2 identifies these pretrial publicity studies and notes whether each study found an effect, did not find an effect or produced mixed results when testing specific prejudicial information. The prejudicial news items were placed in one of three categories: negative factual items (such as prior record, confession, test results), positive factual items (such as released pending trial, denied involvement in crime) or emotional items (such as graphic description of victim, innocent victim, character statements). Results are provided in the table if the defendant's demographic characteristics were considered. Some studies presented several prejudicial factors within a story and it could not be determined which specific factor was being tested. The results from these studies are presented in the "not specific" category.

Prejudicial factors can be categorized as factual or emotional publicity.<sup>48</sup> Factual prejudicial publicity is information that may be relevant to a specific case; it generally points to the guilt of the defendant. Examples of negative factual prejudice include presentation of prior record, confession, negative performance on tests (e.g., polygraphs), inadmissible evidence (e.g., excluded evidence) and custody information. Fewer studies have examined positive factual prejudice, including statements about the suspect's release pending trial or the defendant denying involvement in the crime.

Emotional prejudicial publicity is more subjectively decided, has no evidentiary relevance<sup>49</sup> and includes statements or descrip-

<sup>46</sup>AMERICAN BAR ASSOCIATION, *supra* note 1, at 1.

<sup>47</sup>*See, e.g.,* American Bar Association, *supra* note 1; Otto et al., *supra* note 19; Kerr et al., *supra* note 28; Kramer et al., *supra* note 27; Roper, *supra* note 29.

<sup>48</sup>*See* RAY SURETTE, MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES (1992); James R.P. Ogloff & Neil Vidmar, *The Impact of Pretrial Publicity on Jurors: A Study to Compare the Relative Effects of Television and Print Media in a Child Sex Abuse Case*, 18 LAW & HUMAN BEHAV. 507 (1994); Kramer et al., *supra* note 27.

<sup>49</sup>Kramer et al., *supra* note 27, at 414.

TABLE 2: RESEARCH EXAMINING PRETRIAL PUBLICITY BY TYPE OF PUBLICITY EXAMINED

Research	Factual Negative <sup>a</sup>							Factual Positive <sup>b</sup>					Emotional <sup>c</sup>				DCD <sup>d</sup>	NSP <sup>e</sup>
	PR	IE	CO	TR	WI	CI <sup>f</sup>	OG	RPT	DI	NSE <sup>g</sup>	GP	OI	GDI	GP	IV	CH		
Kline & Jess (1966)																		x
Simon (1966)	✓																	
Tans & Chaffee (1966)			✓			✓	✓	✓	✓			✓						
Simon & Eimermann (1971)										x <sup>h</sup>								
Holberg & Stires (1973)			—										—				x (race)	
Riley (1973)										✓ <sup>h</sup>								
Sue et al. (1973)		—																
Padawer-Singer et al. (1974)	✓		✓															
Robinson (1974)																		x
Sue & Smith (1974)		—																
Sue et al. (1974)		—																
Padawer-Singer & Barton (1975)	✓		✓															
Sue et al. (1975)		✓																
Padawer-Singer et al. (1977)	✓		✓															
Rollings & Blascovich (1977)																		x <sup>h</sup>
Hvistendahl (1979)	✓															✓	x (race)	
Simon (1980)																		x <sup>h</sup>
Constantini & King (1980)																		✓ <sup>h</sup>
Roper (1981)		x											x					
Nietzel & Dillehay (1983)																		✓ <sup>h</sup>
Greene & Loftus (1984)											✓ <sup>i</sup>							
Davis (1986)																		✓ <sup>j</sup>
Greene & Wade (1988)											✓ <sup>i</sup>			✓ <sup>k</sup>				
Kramer & Kerr (1989)															✓ <sup>l</sup>			✓ <sup>m</sup>

Research	Factual Negative <sup>a</sup>							Factual Positive <sup>b</sup>					Emotional <sup>c</sup>				DCD <sup>d</sup>	NSP <sup>e</sup>
	PR	IE	CO	TR	WI	CI <sup>f</sup>	OG	RPT	DI	NSE <sup>g</sup>	GP	OI	GDI	GP	IV	CH		
Kramer et al. (1990)															— <sup>i</sup>			— <sup>m</sup>
Kerr et al. (1991)															— <sup>i</sup>			— <sup>m</sup>
Moran & Cutler (1991)																		✓ <sup>h</sup>
Dexter et al. (1992)																		✓ <sup>n</sup>
Ogloff & Vidmer (1994)															✓ <sup>o</sup>			
Otto et al. (1994)	x	✓ <sup>p</sup>														✓	x (employment)	

Note: ✓ = tested, found an effect; x = tested, did not find an effect; — = mixed results.

<sup>a</sup>PR = Prior Record, IE = Inadmissible Evidence, CO = Confession, TR = Test Results, WI = Witness Information, CI = Custody Information, OG = Opinion on Guilt.

<sup>b</sup>RPT = Released Pending Trial, DI = Denied Involvement, NSE = Not Sensational, GP = General Pretrial, OI = Opinion on Innocence

<sup>c</sup>GDI = Graphic Description of Injury, GP = General Pretrial, IV = Innocent Victim, CH = Character.

<sup>d</sup>DCD = Demographic Characteristic of Defendants.

<sup>e</sup>NSP = Not Specific.

<sup>f</sup>Includes possibility of plea or that the defendant has been arrested.

<sup>g</sup>Story did not include such negative factual information as prior record, confession, or opinion of guilt.

<sup>h</sup>Publicity of an actual murder case. No control condition.

<sup>i</sup>Unrelated stories about a mistaken eyewitness identification.

<sup>j</sup>Publicity was negative: it implied defendant's guilt, including information about prior record, opportunity to dispose of damaging evidence, and emotional instability.

<sup>k</sup>Unrelated stories about a heinous crime.

<sup>l</sup>Seven-year-old girl killed in a hit and run accident.

<sup>m</sup>High factual condition included information on prior record and inadmissible evidence.

<sup>n</sup>Subjects read articles that were highly prejudicial (prior criminal record, confession, character information, drug use, physical abusiveness).

<sup>o</sup>Child abuse case with multiple victims.

<sup>p</sup>Found an effect for both strong and weak inadmissible evidence. Strong inadmissible evidence increased judgments of guilt; weak inadmissible evidence increased not guilty judgments.

tions of events infuriating news consumers. Examples of prejudicial emotional news material examined in past research include stories with graphic descriptions of injuries sustained by victims,<sup>50</sup> stories about a defendant's character or personality traits<sup>51</sup> and stories on a crime committed against an emotionally appealing victim such as a young child or a police officer.<sup>52</sup>

The results presented in Table 2 indicate that existing research has concentrated on the effects of negative factual prejudicial information, focusing primarily on prior record, confessions and inadmissible evidence. Research has ignored two of the factors specifically mentioned by the ABA as likely to prejudice jurors, i.e., the prejudicial impact of test results (polygraph examinations, DNA or other tests of physical evidence) and statements about the identity, testimony or prior record of prospective witnesses.

Five of the six experimental studies examining the effects of prior record indicate that it does influence jury verdicts.<sup>53</sup> For example, after providing subjects with articles to examine how a racial identification, a character statement and information about prior record influenced judgments of guilt, J.K. Hvistendahl found that subjects who read articles about the defendant's prior record were more likely to judge the defendant guilty.<sup>54</sup> Similarly, the one experimental study that considered information about a defendant being released prior to trial found that this information was inversely related to verdicts for guilt.<sup>55</sup> The one study that indicated prior record did not influence initial judgments about guilt, but did find this information caused subjects to think the defendant was a typical criminal. Stereotyping defendants as criminals was, in turn, related to guilty verdicts in this experiment.<sup>56</sup>

Other empirical research, not specifically addressing pretrial publicity issues and not included in Table 2, indicates that knowl-

<sup>50</sup>See, e.g., Ogloff & Vidmar, *supra* note 48; Roper, *supra* note 29; Bruce C. Hoiberg & Lloyd K. Stires, *The Effect of Several Types of Pretrial Publicity on the Guilt Attributions of Simulated Jurors*, 3 J. APPLIED SOC. PSYCHOL. 267 (1973).

<sup>51</sup>See, e.g., Otto et al., *supra* note 19.

<sup>52</sup>See, e.g., Kerr et al., *supra* note 28; Kramer et al., *supra* note 27.

<sup>53</sup>See J. K. Hvistendahl, *The Effect of Placement of Biasing Information*, 56 JOURNALISM Q. 863 (1979); Padawer-Singer et al., *Legal and Social-Psychological Research*, *supra* note 39; Padawer-Singer & Barton, *supra* note 39; Padawer-Singer et al., *Voir Dire*, *supra* note 39; Rita J. Simon, *Murder, Juries, and the Press*, TRANSACTION, May-June 1966, at 64.

<sup>54</sup>Hvistendahl, *supra* note 53, at 865.

<sup>55</sup>Tans & Chaffee, *supra* note 37, at 652.

<sup>56</sup>Otto et al., *supra* note 19, at 464.

edge about a defendant's prior record increases judgments of guilt.<sup>57</sup> For example, Harry Kalven and Hans Zeisel's study of juries in America indicated that juror knowledge of prior criminal record increases negative perceptions of defendants.<sup>58</sup>

Five of the six research studies that have included inadmissible evidence within news stories found some prejudicial impact on judgments of guilt.<sup>59</sup> For example, Stanley Sue and others presented subjects with news stories including information about a gun linked to the defendant that could not be admitted as evidence at trial because of a search and seizure violation.<sup>60</sup> Subjects in the control group read that a gun was found but it was unrelated to the crime. All subjects then read a summary of the trial. Women who read the news stories that contained information about the inadmissible evidence were significantly more likely to believe the defendant guilty, although there was no significant difference in verdicts for male subjects exposed to this same information.<sup>61</sup> Another study found an effect for inadmissible evidence, although its influence depended on the strength of the evidence.<sup>62</sup> Inadmissible evidence had no effect when other evidence presented was strong, but did have an effect when other evidence presented was weak, suggesting that damaging inadmissible evidence has a greater effect when no other evidence exists.<sup>63</sup> Conversely, Robert Roper did not find a significant relationship between inadmissible information and guilty verdicts.<sup>64</sup>

Other researchers have examined inadmissible statements. Amy Otto and others created newspaper articles about a man ar-

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<sup>57</sup>See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966); Valerie Hans & Anthony N. Dobb, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L. Q. 235 (1976); Anthony N. Dobb & Herschi M. Kirshenbaum, *Some Empirical Evidence on the Effects of S.12 of the Canadian Evidence Act Upon the Accused*, 15 CRIM. L. Q. 88 (1972).

<sup>58</sup>Kalven & Zeisel, *supra* note 57, at 390.

<sup>59</sup>See Otto et al., *supra* note 19; Stanley Sue et al., *Authoritarianism, Pretrial Publicity, and Awareness of Bias in Simulated Jurors*, 37 PSYCHOL. REP. 1299 (1975); Stanley Sue & Ronald E. Smith, *How Not to Get a Fair Trial*, PSYCHOL. TODAY, May 1974, at 86; Stanley Sue et al., *Biasing Effects of Pretrial Publicity on Judicial Decisions*, 2 J. CRIM. JUST. 163 (1974); Stanley Sue et al., *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 31 J. APPLIED SOC. PSYCHOL. 345 (1973).

<sup>60</sup>See Sue et al., *Effects of Inadmissible Evidence*, *supra* note 59.

<sup>61</sup>*Id.* at 168.

<sup>62</sup>Sue et al., *Effects of Inadmissible Evidence*, *supra* note 59.

<sup>63</sup>*Id.* at 351.

<sup>64</sup>Roper, *supra* note 29, at 384.



rested for disorderly conduct after arguing with his fiancée outside an apartment building.<sup>65</sup> One experimental manipulation included weak inadmissible statements by a neighbor who said that she would not want to live with the defendant. Subjects who read this statement were more likely to say that the defendant was not guilty prior to trial. Otto concluded that the "the neighbor's statement, 'I wouldn't live with the man if my life depended on it!' was viewed as unfair and caused subjects to feel sympathy for the defendant."<sup>66</sup>

In a series of studies, researchers attempted to document the effects of factual and emotional biasing publicity on 791 mock jurors.<sup>67</sup> The biasing publicity included statements about the defendant's prior record and other inadmissible incriminating evidence. This publicity had no effect on predeliberation verdicts, but did have a biasing effect on postdeliberation verdicts in both studies.<sup>68</sup> Another test of this same combination of factual prejudicial factors produced a significant biasing effect only on individual verdicts.<sup>69</sup>

Other factual negative research has focused on the effects of the publication of the defendant's confession. Four of the five research studies that examined this prejudicial news item found it to be a strong predictor of biased verdicts.<sup>70</sup> For example, an experiment by Mary Tans and Steven Chaffee found that favorable or unfavorable statements by a district attorney about the suspect's guilt were not as damaging as reporting the defendant's confession, concluding that a police report of a confession was the single most damaging piece of prejudicial information.<sup>71</sup> An experiment by Bruce Hoiberg and Lloyd Stires, however, obtained mixed results on the effects of a reported confession.<sup>72</sup> Women with low intelligence quotient (IQ) scores, exposed to information about a suspect's confession, were more likely to judge the defendant guilty. Male jurors in this study were not affected by the confession publicity.<sup>73</sup>

<sup>65</sup>Otto et al., *supra* note 19.

<sup>66</sup>*Id.* at 464.

<sup>67</sup>Kerr et al., *supra* note 28; Kramer et al., *supra* note 27.

<sup>68</sup>Kerr et al., *supra* note 28, at 675; Kramer et al., *supra* note 27, at 422, 424.

<sup>69</sup>Geoffrey P. Kramer & Norbert L. Kerr, *Laboratory Simulation and Bias in the Study of Juror Behavior: A Methodological Note*, 13 LAW & HUMAN BEHAV. 89 (1989).

<sup>70</sup>Padawer-Singer et al., *Legal and Social-Psychological Research*, *supra* note 39; Padawer-Singer & Barton, *supra* note 39; Padawer-Singer et al., *Voir Dire*, *supra* note 39; Tans & Chaffee, *supra* note 37.

<sup>71</sup>Tans & Chaffee, *supra* note 37, at 652.

<sup>72</sup>Hoiberg & Stires, *supra* note 50.

<sup>73</sup>*Id.* at 272.

The Tans and Chaffee experiment is the only study that examined several positive pieces of factual information, comparing the effects of custody information and opinions on guilt (factual negative) to information on the defendant being released pending trial, denying involvement and opinions on innocence (factual positive).<sup>74</sup> Tans and Chaffee found that a suspect was more likely to be judged guilty when the information presented in a news story was unfavorable, but judged innocent when the information was favorable.<sup>75</sup>

Two published articles examined whether general pretrial publicity can have effects.<sup>76</sup> These studies examined whether "general information that is prominently in the news, but unrelated to a particular case on trial" has an impact on specific verdicts.<sup>77</sup> For example, in one experiment, subjects read unrelated newspaper articles about a heinous crime or newspaper articles about a miscarriage of justice resulting from a mistaken eyewitness identification, and then participated in a mock jury trial.<sup>78</sup> The results indicated that subjects who read the unrelated heinous crime story were more likely to convict, and those who read the stories about the miscarriage of justice were significantly less likely to convict.<sup>79</sup> The study concluded that there can be a general hardening or softening effect on jurors depending on the type of information provided in news stories.<sup>80</sup>

The two other studies considering factual positive information produced mixed results using survey research designs.<sup>81</sup> Both studies examined actual murder cases that were not presented sensationally. Rita Simon and Thomas Eimermann found that although 80 percent of the community surveyed had knowledge of a particular case, the defendant was found not guilty at trial.<sup>82</sup> Sam Riley, however, found that publicity about the Jeffrey MacDonald case produced bias, although it was a conservative test of pretrial publicity because the media did not present prejudicial information about the case.<sup>83</sup>

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<sup>74</sup>Tans & Chaffee, *supra* note 37.

<sup>75</sup>*Id.* at 652.

<sup>76</sup>Greene & Loftus, *supra* note 40; Greene & Wade, *supra* note 40.

<sup>77</sup>Greene & Loftus, *supra* note 40, at 212.

<sup>78</sup>Greene & Wade, *supra* note 40.

<sup>79</sup>*Id.* at 127-28.

<sup>80</sup>*Id.* at 128.

<sup>81</sup>Simon & Eimermann, *supra* note 31; Riley, *supra* note 41.

<sup>82</sup>Simon & Eimermann, *supra* note 31, at 344.

<sup>83</sup>Riley, *supra* note 41, at 23.

The effects of emotional news material have been scrutinized less frequently, although several important studies have been published. Most of these studies have considered negative emotional information. Hoiberg and Stires, for instance, examined whether a dramatic newspaper account of a heinous crime would prejudice subjects.<sup>84</sup> High school students were exposed to one of four conditions in this experiment: high prejudicial publicity, low prejudicial publicity, high heinous crime publicity, or low heinous crime publicity. Subjects in the high heinous crime condition read news stories about a badly mutilated 16-year-old—the head was smashed beyond recognition, and the corpse was found half-naked, face down in a blood-soaked patch of weeds. Subjects listened to a 15-minute tape recording of a trial before indicating whether they thought the defendant was guilty. Female students exposed to the high heinousness publicity were significantly more likely to believe that the defendant was guilty, but female students exposed to the low heinousness condition (a girl died because of a head injury) and male students exposed to either high or low heinousness publicity were not influenced by the publicity.<sup>85</sup>

Roper examined whether jurors exposed to a sensational news article describing a bloody body and that the defendant was a friend of the victim were more likely to convict a defendant than juries not exposed to pretrial publicity.<sup>86</sup> Surprisingly, jurors not exposed to pretrial publicity were more likely to “find the defendant guilty more often than those who received news articles.”<sup>87</sup>

Four emotional pretrial publicity experiments have examined the effects of exposing subjects to appealing victims. The emotional prejudice tested in three of these experimental studies concerned a 7-year-old girl killed in a hit-and-run accident.<sup>88</sup> The vehicle of a defendant, who was arrested for a supermarket robbery, matched the car that hit the girl. Subjects also viewed an emotionally appealing statement by the girl’s mother after the child died. Although this statement had no impact on predeliberation verdicts in the two later

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<sup>84</sup>Hoiberg & Stires, *supra* note 50.

<sup>85</sup>*Id.* at 272.

<sup>86</sup>Roper, *supra* note 29, at 383.

<sup>87</sup>*Id.* at 384.

<sup>88</sup>See Kerr et al., *supra* note 28; Kramer et al., *supra* note 27; Kramer & Kerr, *supra* note 69.

studies, it did have an effect in the first study<sup>89</sup> and on the postde-liberation verdicts of jurors in the other two studies.<sup>90</sup>

Similarly, James Ogloff and Neil Vidmar examined whether a particularly heinous crime prejudiced potential jurors.<sup>91</sup> They examined the effects of publicity from a heinous child abuse case, comparing newspaper and television publicity. Graphic testimony involving allegations of sexual abuse was used to test the effects of emotional prejudice. The participants in the experiment were randomly assigned to a group viewing 25 minutes of television news excerpts, a group reading six newspaper articles, a group exposed to the print and television news or a control group that received no media information. This research indicated that emotional pretrial publicity has an effect on judgments of guilt, because television exposure of this case had a greater biasing effect than did newspaper exposure, but the combined effects of both had the most impact on perceptions of guilt.<sup>92</sup>

Two experimental studies have found that character statements about a defendant has a prejudicial impact.<sup>93</sup> Otto and others, for example, found that an inadmissible character statement about the defendant being a drug user had a prejudicial effect on subjects before and after a mock jury trial.<sup>94</sup> Similarly, Hvistendahl found that reading a statement that a defendant was a member of a motorcycle gang increased judgments of guilt.<sup>95</sup>

## DO PROTECTIVE REMEDIES REDUCE PREJUDICIAL EFFECTS?

If it could be demonstrated that procedures exist that mitigate the effects of adverse publicity, then fair trial concerns would be less pressing. Courts have relied primarily on post-publication procedures to protect fair trial rights against prejudicial publicity, being unwilling to impose prior restraints on the news media. In *Nebraska Press Association v. Stuart*, the Supreme Court noted that First Amendment rights are not absolute, but "the barriers to prior restraint remain high."<sup>96</sup> The Supreme Court's reluctance to re-

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<sup>89</sup>Kramer & Kerr, *supra* note 69, at 97.

<sup>90</sup>Kerr et al., *supra* note 28, at 675; Kramer et al., *supra* note 27, at 424.

<sup>91</sup>Ogloff & Vidmar, *supra* note 48.

<sup>92</sup>*Id.* at 517.

<sup>93</sup>See Hvistendahl, *supra* note 53; Otto et al., *supra* note 19.

<sup>94</sup>Otto et al., *supra* note 19, at 463.

<sup>95</sup>Hvistendahl, *supra* note 53, at 865.

<sup>96</sup>*Nebraska Press Association v. Stuart*, 427 U.S. 539, 570 (1976).

TABLE 3: PRETRIAL PUBLICITY RESEARCH EXAMINING PROTECTIVE REMEDIES BY TYPE OF REMEDY

Research	By Type of Remedy					
	Judicial Instructions	Continuance	Voir Dire	Deliberations	Change of Venue	Other
Kline & Jess (1966)	x					
Simon (1966)	✓					
Riley (1973)					x	
Sue et al. (1973)	x					
Padawer-Singer et al. (1974)			✓			
Sue & Smith (1974)	x					
Sue et al. (1974)	x					
Padawer-Singer et al. (1975)			✓			
Nietzel & Dillehay (1983)					✓	
Davis (1986)		✓		✓		
Kramer & Kerr (1989)						x <sup>a</sup>
Kramer et al. (1990)	x	—		x		
Kerr et al. (1991)	x	—	x	x		
Dexter et al. (1992)			x			
Otto et al. (1994)						x <sup>b</sup>

Note: ✓ = found it mitigated the effects of pretrial publicity; x = found it did not mitigate the effects of pretrial publicity; — = mixed results

<sup>a</sup>Examined the effects of trial length.

<sup>b</sup>Examined the effects of trial evidence.

strain the rights of the media to present what they know places a heavy burden on post-publication remedies. Judges, for example, rely on remedies such as judicial instructions, continuances, expanded *voir dire* and change of venue motions, assuming that they effectively mitigate the effects of prejudicial publicity despite a “serious lack of knowledge regarding how judicial actions can ameliorate” pretrial influences.<sup>97</sup> Relying on specific remedies, absent empirical support, can upset the balance between the conflicting rights of free press and fair trial. Decisions to use one of the above remedies may unreasonably restrict the media or may not adequately protect fair trial rights. Table 3 presents the empirical studies that have examined the mitigating effects of protective remedies.

<sup>97</sup>Carroll et al., *supra* note 10, at 189.

### *Judicial Instructions*

Judges rely heavily on admonitions, assuming that jurors can set aside prejudices and ignore inadmissible testimony. Yet only one empirical study has found judicial instructions to effectively mitigate the effects of pretrial publicity.<sup>98</sup> Simon compared the responses of subjects who read three news stories mentioning the defendant's prior record with those of subjects who read a set of neutral news stories that did not include this prejudicial information. All subjects were then exposed to an abbreviated trial that included an admonition from the judge. Simon found that the jurors who read about the defendant's prior record had predetermined attitudes about his guilt. After all subjects listened to the trial, however, there were no differences in jury decisions. The author reported that a judicial admonishment ensured a fair trial and that pretrial publicity did not prejudice verdicts.<sup>99</sup>

However, most research indicates that admonishments are of limited value in mitigating prejudicial effects.<sup>100</sup> Stanley Sue and others,<sup>101</sup> for example, tested whether judicial instructions could reduce the impact of inadmissible evidence publicity. After reading newspaper articles that contained this prejudicial information, subjects read a four-page booklet containing judicial instructions, a description of the crime and a trial summary. Inadmissible evidence publicity had an effect on subjects even after they read the judicial admonishment.<sup>102</sup> Similarly, F. Gerald Kline and Paul Jess found members of four mock juries referred to prejudicial news during deliberations despite an instruction not to consider it, although only one of the mock juries based a verdict on the prejudicial publicity.<sup>103</sup>

Kramer and others<sup>104</sup> examined the effectiveness of judicial instructions in remedying the prejudicial effects of factual and emotional publicity. These researchers exposed all subjects to stand-

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<sup>98</sup>Simon, *supra* note 53.

<sup>99</sup>*Id.* at 42. Simon's study has been criticized by other researchers because she did not use an instruction control condition to compare effects. See Carroll et al., *supra* note 10.

<sup>100</sup>See Kerr et al., *supra* note 28; Kramer et al., *supra* note 27; Sue & Smith, *supra* note 59; Sue et al., *Biasing Effects*, *supra* note 59; Sue et al., *Effects of Inadmissible Evidence*, *supra* note 59; Kline & Jess, *supra* note 26.

<sup>101</sup>See Sue et al., *Effects of Inadmissible Evidence*, *supra* note 59.

<sup>102</sup>*Id.* at 351.

<sup>103</sup>Kline & Jess, *supra* note 26, at 114.

<sup>104</sup>Kramer et al., *supra* note 27.

ard jury instructions, including a description of the elements of the crime, charges and burden of proof. Subjects also heard one of two instructions concerning publicity. The treatment group was specifically instructed not to use pretrial publicity or their reactions to it during deliberations. The control group was not directly charged on pretrial publicity, but told to disregard anything seen or heard when the court was not in session. Results indicated that neither of these instructions had an effect on individual or group verdicts, and actually strengthened the impact of negative factual publicity.<sup>105</sup> These results support other research indicating that judicial instructions can strengthen juror bias by drawing attention to the material in question.<sup>106</sup>

Although not directly testing concerns about pretrial publicity, other empirical research is instructive on the effectiveness of judicial instructions. Some of this research provides support for the effectiveness of this remedy. For example, Harry Kalven and Hans Zeisel<sup>107</sup> found that jurors take seriously any instructions from the court suggesting they attempt to disregard inadmissible material. Sharon Wolf and David Montgomery had 168 undergraduates read a trial transcript that included critical testimony which was ruled admissible, ruled inadmissible or ruled inadmissible with an admonishment from a judge.<sup>108</sup> In each instance the critical aspects of the testimony strongly favored either the prosecution's case or the defense's case. These researchers found that it "is possible for a judge to induce jurors to disregard evidence which has been introduced in a trial but subsequently ruled inadmissible."<sup>109</sup> However, the effectiveness of instruction depended on how the judge admonished the mock jurors.<sup>110</sup> The biasing effect of the evidence was eliminated only when the judge defined the evidence as inadmissible, but when he specifically admonished the jurors to disregard the inadmissible evidence, juror bias was not reduced.<sup>111</sup>

<sup>105</sup>*Id.* at 430.

<sup>106</sup>See Dale W. Broeder, *The University of Chicago Project*, 38 NEB. L. REV. 744 (1959).

<sup>107</sup>KALVEN & ZEISEL, *supra* note 57.

<sup>108</sup>Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors*, 7 J. APPLIED SOC. PSYCHOL. 205 (1977).

<sup>109</sup>*Id.* at 216.

<sup>110</sup>*Id.*

<sup>111</sup>The results of the Wolf and Montgomery study point to a much broader issue than judges' admonitions. Do jurors generally understand judges' instructions?

Results from other research support the conclusion that judicial instructions are insufficient.<sup>112</sup> William Thompson and others<sup>113</sup> tested whether judicial instructions containing a due process or a crime control emphasis had an impact on individual or group verdicts. The due process condition stressed the importance of adhering to procedural guidelines; the crime control instructions emphasized the need to use discretion in applying the rules of law. The variation in judicial instructions had no significant effect on guilty verdicts.<sup>114</sup>

### Continuances

Motions for continuances are frequently approved by judges to limit the impact of pretrial publicity. Judges think continuances can "dampen the effects of prejudicial publicity," assuming that community hostility will subside with time and jurors will forget the pretrial information presented after numerous delays.<sup>115</sup> Researchers, however, question whether time has the power to erode the harmful effects of prejudicial publicity.<sup>116</sup> Neil Vidmar and Julius Judson used a survey to see whether knowledge about a criminal fraud case was forgotten after a considerable period of time.<sup>117</sup> More than 100 separate stories were published about this

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Research indicates that the answer to this question is no. See, e.g., Judith N. Levi, *Evaluating Jury Comprehension of Illinois Capital-Sentencing Instructions*, 68 AM. SPEECH 20 (1993); Shari S. Diamond, *Instructing on Death: Psychologists, Juries, and Judges*, 48 AM. PSYCHOLOGIST 423 (1993); James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances*, 16 LAW & HUMAN BEHAVIOR 203 (1992); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUMAN BEHAVIOR 163 (1977).

<sup>112</sup>See, e.g., Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberations*, 8 LAW & HUMAN BEHAVIOR 53 (1984); Sarah Tanford & Steven Penrod, *Social Inference Processes in Juror Judgments and Multiple-Offense Trials*, 47 J. PERSONALITY & SOC. PSYCHOL. 749 (1984); William C. Thompson et al., *Inadmissible Evidence and Juror Verdicts*, 40 J. PERSONALITY & SOC. PSYCHOL. 453 (1981); Hans & Dobb, *supra* note 57.

<sup>113</sup>Thompson et al., *supra* note 112.

<sup>114</sup>*Id.* at 457.

<sup>115</sup>Peter D. O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls: A Theory of Procedural Justice*, 65 U. DET. L. REV. 169, 177 (1988).

<sup>116</sup>See MICHAEL T. NIETZEL & RONALD C. DILLEHAY, *PSYCHOLOGICAL CONSULTATION IN THE COURTROOM* (1986); Neil Vidmar & Julius Judson, *The Use of Social Science in a Change of Venue Application*, 59 CANADIAN B. REV. 76 (1981).

<sup>117</sup>Vidmar & Judson, *supra* note 116.



case, many of them accompanied by major headlines. The survey, conducted nearly four months after the end of the main publicity, indicated that the case remained notorious.<sup>118</sup>

Three pretrial publicity studies provide mixed support for the effectiveness of continuances.<sup>119</sup> Subjects in Roger Davis' study viewed a videotaped trial immediately or one week after reading negative news stories about the defendant.<sup>120</sup> Davis found that "within the prejudicial publicity juries, delay tended to produce more acquittals while an immediate trial seemed to end in hung juries."<sup>121</sup> Two other pretrial publicity studies found that continuances remedy the effects of factual publicity but had no impact on emotional publicity.<sup>122</sup>

### *Voir dire*

Expanded *voir dire*—judges or attorneys questioning the jury *venire* to detect bias—is the primary means of judicial protection used by courts to uncover pretrial prejudice.<sup>123</sup> Judges have expressed confidence that *voir dire* is effective.<sup>124</sup> Two studies support the conclusion that *voir dire* is an effective means of weeding out partial jurors.<sup>125</sup> In these two studies, subjects read newspaper articles containing information about the prior record and confession of the defendant. Ten juries were selected without *voir dire* examination; 13 juries were selected with it. The jurors selected with *voir dire* were less likely to convict the defendant: "Voor dire proceedings carried out by two lawyers, one for the prosecution and one for the defense, seem to ensure the selection of the 'best' possible jurors, i.e., the most impartial jurors, jurors who will examine all sides of a trial."<sup>126</sup>

<sup>118</sup>*Id.* at 86.

<sup>119</sup>See Kerr et al., *supra* note 28; Kramer et al., *supra* note 27; Davis, *supra* note 11.

<sup>120</sup>Davis, *supra* note 11.

<sup>121</sup>*Id.* at 596.

<sup>122</sup>Kerr et al., *supra* note 28, at 675; Kramer et al., *supra* note 27, at 431–32.

<sup>123</sup>See Newton N. Minow & Fred H. Cate, *Who Is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 632 (1991); NIETZEL & DILLEHAY, *supra* note 116.

<sup>124</sup>See VALERIE HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986).

<sup>125</sup>Padawer-Singer & Barton, *supra* note 39; Padawer-Singer et al., *Voir Dire*, *supra* note 39.

<sup>126</sup>Padawer-Singer et al., *Voir Dire*, *supra* note 39, at 389. This study has been criticized because *voir dire* did not actually reduce the conviction rates of the subjects exposed to prejudicial publicity, but raised conviction rates for those not exposed to publicity. See Kerr et al., *supra* note 28; Carroll et al., *supra* note 10.

Two recent pretrial studies question the protective ability of *voir dire*.<sup>127</sup> Dexter and others,<sup>128</sup> for example, examined whether attorney-conducted *voir dire* was an effective remedy against the effects of pretrial publicity. Sixty-eight college students were exposed to either minimal or extensive *voir dire* procedures after reading prejudiced newspaper articles which included information about prior record, confession, character, drug use, and the physical abusiveness of the defendant. The experimental subjects exposed to pretrial publicity found the defendant to be more culpable, and *voir dire* did not reduce the impact of pretrial publicity.<sup>129</sup>

Similarly, Kerr and others<sup>130</sup> found that factual and emotional pretrial publicity was not remedied by *voir dire* examination. These researchers sent the videotaped responses of jurors interviewed to judges and attorneys. After viewing the videotapes, judges were asked to rate the likelihood of granting a challenge for cause, and attorneys were asked to indicate how likely they were to seek either a for-cause challenge or a peremptory challenge. These researchers found that "those exposed to publicity and excused, by whatever party, did not differ on their inclination to convict after deliberations from those not excused. ... The net effect of careful *voir dire* concerning pretrial publicity, therefore, was nil, and the bias created by the publicity survived *voir dire* unscathed."<sup>131</sup>

The ineffectiveness demonstrated by existing experimental studies is disconcerting because the procedures emulated in laboratory experiments represent competent *voir dire*. One pretrial publicity study is particularly informative on the limited impact of *voir dire* because the researchers tried to create a powerful manipulation of the *voir dire* process.<sup>132</sup> Subjects were exposed to minimal *voir dire* (e.g., standard *voir dire* examination used in federal courts) or extended *voir dire* (e.g., the defense attorney spent one hour attempting to eliminate jury bias). *Voir dire* was conducted by two experienced local attorneys. One would expect that *voir dire* would be more likely to have an effect in the laboratory than in courtrooms

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<sup>127</sup>Hedy R. Dexter et al., *A Test of Voir Dire as a Remedy for the Prejudicial Effects of Pretrial Publicity*, 22 J. APPLIED SOC. PSYCHOL. 819 (1992); Kerr et al., *supra* note 28.

<sup>128</sup>Dexter et al., *supra* note 127.

<sup>129</sup>*Id.* at 829.

<sup>130</sup>Kerr et al., *supra* note 28.

<sup>131</sup>*Id.* at 687-88, 697.

<sup>132</sup>Dexter et al., *supra* note 127.

because of related research examining the quality of courtroom *voir dire*. Research results have shown that attorneys in actual cases question potential jurors in a cursory manner, are ineffective at detecting bias and use *voir dire* to present a theory of the case rather than eliminate biased jurors.<sup>133</sup>

Moreover, the effectiveness of *voir dire* is circumvented by the structure of the questioning process. Generally, individuals are questioned in the presence of other members of the *venire*. As members listen to the responses of those jurors being questioned, they can formulate answers or lie to be included or excluded, according to their preference.<sup>134</sup> Potential jurors are asked directly whether they can be impartial when they have been exposed to pretrial publicity. "The demand characteristics for an affirmative answer to this question, particularly when asked by a judge in open court, are so strong that its utility as a screener of bias is dubious."<sup>135</sup> Asking this question is analogous to asking practicing alcoholics if they have their drinking under control.<sup>136</sup>

The ability of attorneys or judges to detect bias at *voir dire* is also limited because jurors may not deliberately manipulate their answers. Research indicates that jurors think that they can be fair despite being influenced by pretrial publicity.<sup>137</sup> James Ogloff and Neil Vidmar, for example, found that emotional publicity about a heinous child abuse case influenced judgments of guilt, but the subjects thought they were not affected by this information and would be fair in their judgments.<sup>138</sup>

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<sup>133</sup>See HANS & VIDMAR, *supra* note 124; Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, 40 AM. U. L. REV. 703 (1991); David Suggs & Bruce B. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245 (1981); Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1965).

<sup>134</sup>See Suggs & Sales, *supra* note 133.

<sup>135</sup>NIETZEL & DILLEHAY, *supra* note 116, at 73.

<sup>136</sup>Moran & Cutler, *supra* note 41, at 362.

<sup>137</sup>See Ogloff & Vidmar, *supra* note 48; Kerr et al., *supra* note 28; Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUMAN BEHAVIOR 131 (1987); Suggs & Sales, *supra* note 133; Constantini & King, *supra* note 41; Hans Zeisel & Shari S. Diamond, *The Effects of Peremptory Challenges on Jury and Verdict: An Experiment in Federal District Court*, 30 STAN. L. REV. 491 (1978).

<sup>138</sup>Ogloff & Vidmar, *supra* note 48.

## Deliberations

The limited ability of judicial instructions, continuances and *voir dire* to protect against pretrial publicity may be insignificant if jurors can arrive at a fair verdict when deliberating as a group. Some scholars claim that cases of defendants being found not guilty in actual trial situations, despite substantial amounts of news coverage, provide *a priori* evidence that pretrial publicity does not have an effect.<sup>139</sup> Rita Simon has written, "The facts are that, despite substantial adverse publicity, Angela Davis, John Connally, and John Mitchell all were acquitted."<sup>140</sup> Some empirical research has indicated that jury deliberations provide an opportunity for the group to overcome individual biases, correct errors and eliminate irrelevant facts.<sup>141</sup>

Three pretrial publicity studies consider the protective ability of jury deliberation. Davis found that jurors shifted towards leniency after deliberation.<sup>142</sup> When jurors mentioned prejudicial news during deliberations, others suggested that the prejudicial information should not be used in their deliberations. Two other studies, however, indicate that jury deliberation has no protective effect and may exaggerate pretrial influences.<sup>143</sup> The magnification of bias may be caused by minority juror members shifting to the majority,<sup>144</sup> a process known as group polarization.<sup>145</sup>

## Change of Venue

If pretrial publicity is adverse, then the greatest degree of prejudice should develop within the community where the crime occurred.<sup>146</sup> The purpose of granting a change of venue motion is to move the trial to another location, protecting the defendant from

<sup>139</sup>See SIMON, *supra* note 35; ALFRED FRIENDLY & RONALD L. GOLDFARB, *CRIME AND PUBLICITY: THE IMPACT OF NEWS ON THE ADMINISTRATION OF JUSTICE* (1967).

<sup>140</sup>SIMON, *supra* note 35, at 117.

<sup>141</sup>Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205 (1989).

<sup>142</sup>See Davis, *supra* note 11.

<sup>143</sup>Kerr et al., *supra* note 28; Kramer et al., *supra* note 27.

<sup>144</sup>See Hans & Dobb, *supra* note 57; Richard R. Izzett & Walter Leginski, *Group Discussion and the Influence of Defendant Characteristics in a Simulated Jury Setting*, 93 J. SOC. PSYCHOL. 271 (1974).

<sup>145</sup>See David G. Myers & Helmut Lamm, *The Group Polarization Phenomenon*, 83 PSYCHOL. BULL. 602 (1976).

<sup>146</sup>Carroll et al., *supra* note 10.

negative community sentiment and increasing the likelihood of selecting impartial jurors. There are two studies on the effectiveness of change of venue motions which provide conflicting results. Riley, for example, compared responses of individuals living in the city where Jeffrey MacDonald was accused of killing his wife and two children with those of individuals in two other cities in the same state.<sup>147</sup> There were no significant differences in the responses of those surveyed; all cities were saturated by news coverage.<sup>148</sup> Michael Nietzel and Ronald Dillehay surveyed individuals about five different cases.<sup>149</sup> They found that "without exception a far greater percentage of respondents in venue counties had read or heard about the case than residents of adjacent or preferred counties."<sup>150</sup> Venue respondents were also more likely to believe that the defendant was guilty than those surveyed from adjacent counties.<sup>151</sup> These results suggest that a change of venue might be an effective remedy for sensational cases that receive only local news attention.<sup>152</sup>

Courts are reluctant to grant motions to change venue because judges do not like to admit that a defendant cannot receive a fair trial in their jurisdiction.<sup>153</sup> In addition, changing venue is expensive and inconvenient for the parties involved.<sup>154</sup> Whether changing the venue would be an effective way to protect defendants' fair trial rights is still an unanswered question because of the limited amount of empirical evidence examining its efficacy. As electronic technologies have become increasingly sophisticated, the prospect of protecting a defendant's fair trial rights in a sensational case solely by means of a change of venue is suspect.

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<sup>147</sup>Riley, *supra* note 41.

<sup>148</sup>*Id.* at 20.

<sup>149</sup>Nietzel & Dillehay, *supra* note 41.

<sup>150</sup>*Id.* at 320.

<sup>151</sup>*Id.* at 321.

<sup>152</sup>Some researchers have reported on successful efforts to obtain a change of venue in a specific case. See John B. McConahay et al., *The Uses of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little*, 41 LAW & CONTEMP. PROBS. 205 (1977). The defendant in this high-publicity case was acquitted, although it could not be determined whether the venue change played a role in the acquittal.

<sup>153</sup>See John A. Burgess, *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury*, 42 NOTRE DAME LAW. 925 (1967).

<sup>154</sup>See NIETZEL & DILLEHAY, *supra* note 116.

### *Other Remedies*

A number of other postpublication remedies exist for judges to employ when attempting to protect a defendant's right to a fair trial. For example, a judge could import a *venire* from another community less prejudiced by the news coverage. In addition, judges could sequester the jury, question members of the *venire* individually or sever the defendant's case if more than one defendant is accused of a crime. One should be skeptical of their curative effects judging by research examining the remedies discussed above.

At a more general level, the utilization of specific remedies may not be necessary as the effects of pretrial publicity could be negated by the trial process itself. For example, a recent study examined whether the presentation of trial evidence can mitigate the prejudicial influences of various types of pretrial publicity, including prior record, strong inadmissible and weak inadmissible statements, character evidence and employment status.<sup>155</sup> The researchers found that the character evidence, as well as strong inadmissible and weak inadmissible statements, had an effect on how subjects evaluated the suspect's guilt.<sup>156</sup> Trial evidence weakened the effects of character pretrial publicity but had no effect on the other pretrial influences.<sup>157</sup>

Other research has examined whether factual and emotional publicity had an effect after subjects observed a short (10 minutes) or long (100 minutes) mock trial.<sup>158</sup> Both types of publicity had a significant effect on individual verdicts.<sup>159</sup> Conviction rates were higher for subjects exposed to the 10-minute armed robbery trial, although trial length did not interact with either type of publicity.<sup>160</sup> Hence, it does not appear as though evidence presented at trial is sufficient to overcome the negative effects of pretrial publicity. What remains to be assessed, therefore, is the frequency with which, and documentation of the specific types of, prejudicial information included in a sample of actual pretrial articles.

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<sup>155</sup>Otto et al., *supra* note 19.

<sup>156</sup>*Id.* at 461–62.

<sup>157</sup>*Id.* at 465.

<sup>158</sup>Kramer & Kerr, *supra* note 69.

<sup>159</sup>*Id.* at 95.

<sup>160</sup>*Id.* at 96.

## METHOD

The data presented here comprise one portion of the Kentucky Data Project, an attempt by attorneys with the Kentucky Capital Litigation Resource Center (KCLRC) to track capital cases in the state. One means for doing so is to operate a clipping service, the results of which are the data analyzed in this article.

### *Kentucky Data Project*

Kentucky has a statewide public defender system, with the main office located in the state capital of Frankfort. In the Frankfort office is a group of attorneys, collectively known as the Capital Trial Unit (CTU), who try only capital cases. In the early 1980s the director of the CTU requested that all attorneys in the field offices collect newspaper articles devoted to potential capital cases and send copies of the articles to the main office. Thus began the Kentucky Data Project.

As articles were received, they were placed in temporary folders until the final disposition of the case was determined. Then the folder for each case was placed in one of 10 possible categories.<sup>161</sup> The completeness of each file relied exclusively on the self-motivation of the attorneys in the field offices. Hence, there is no way of knowing the extent of compliance and thus the representativeness of the articles compiled in the early years of the data project. Realizing the limitations of this procedure, the project became more centralized.

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<sup>161</sup>1) Capital cases since effective date of statute (1977) with original sentence of death; 2) capital cases since effective date of statute, tried to jury or judge, death penalty not imposed after case reached penalty phase; 3) potential capital cases disposed of by plea to intentional manslaughter or murder, but less than death penalty; 4) potential capital cases that went to trial; prosecution did not seek or was prevented by a court ruling from seeking the death penalty, but which resulted in a conviction of murder or manslaughter in the first degree; 5) potential capital cases in which defendant was arrested, given immunity and/or pleaded to or was convicted of a lesser included homicide offense other than intentional murder or manslaughter, acquitted, found incompetent or where case was dismissed or never prosecuted; 6) case closed due to death of suspect or defendant; 7) no aggravating factors appear; 8) prosecution seeks death penalty but capital trial results in conviction during guilt phase of intentional manslaughter; 9) potential capital cases not prosecuted because defendant is incarcerated elsewhere on similar reasons, and 10) vehicular homicide.

From approximately 1984 to 1989 an attorney was hired to oversee the project. Thus, files from 1984 are substantially more likely to be complete than the files associated with cases in the early days of the project. In 1989 the KCLRC assumed responsibility for the project. By 1989 the project was subscribing to eight newspapers from within the state, including the two major daily newspapers, the *Louisville Courier Journal* and the *Lexington Herald-Leader*. The combined circulation areas of these two newspapers covers the entire state. Additionally, an inmate on work-release from the local rehabilitation center was assigned to operate a clipping service. The project now subscribes to 20 newspapers across the state, most of them weeklies from small rural communities. The newspaper articles gathered for the Kentucky Data Project were provided to the authors for analysis.<sup>162</sup>

### *Selection of Cases*

In no case can the potential negative effects of pretrial publicity be more profound than when an alleged offender faces the possibility of a death sentence. For this reason, we have focused our analysis on the first two categories of the Kentucky Data Project: 1) capital cases since the effective date of the death penalty statute (1977) in which a death sentence was imposed, and 2) capital cases since the effective date of the statute, tried to a jury or judge, with a death penalty not imposed after the case reached the penalty phase. We selected 1985 as the first year of the current study as we were mindful of the potential for missing information in the early years of the project.<sup>163</sup>

The articles included in the sample appeared from 1985 to 1991. Given this specification, there are 56 cases in the sample, 44 (78.5 percent) of which are cases in which the death penalty was not imposed (hereinafter called "life cases"). The number of pretrial articles devoted to these 56 cases is 507. The number of articles associated with a single case ranges from none for three cases to 81 articles for one case.

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<sup>162</sup>One of the responsibilities of the Kentucky Capital Litigation Resource Center is to monitor all cases which may result in the imposition of the death penalty. This is accomplished through the project. Thus, the data were not compiled for the researchers' use. Rather, access was provided to the project for the researchers.

<sup>163</sup>Two cases from 1984 and one case from 1983 also are included in the sample.



### *Content Analysis*

We compiled the pretrial publicity data from newspaper articles using content analysis. This research technique transforms large amounts of data into smaller, more manageable categories. The categories constructed are representative of what is presented about certain topics, allowing the researcher to draw conclusions about the materials presented.<sup>164</sup> To increase the reliability of the inferences made from content analysis, a consistent set of rules must be applied to each newspaper article examined. A comprehensive coding instrument was developed to accomplish this objective. The development of the coding instrument was based on the literature devoted to issues of pretrial publicity. In addition, the researchers read several of the newspaper articles to get a flavor of recurrent themes, and also examined coding instruments used in other content research on crime topics to be thorough in collection of content data.<sup>165</sup>

The coding instrument was designed to measure both factual and emotional types of publicity.<sup>166</sup> In particular, information was coded on the factual factors examined in past research and many factors not previously considered. The factual items collected include prior record; confessions; inadmissible evidence; test results; witness information; statements about the strength of evidence, guilt of the defendant and the appropriate sentence; and reports of escape concerns and security measures. Content data about aggravating (factual negative) and mitigating (factual positive) factors presented in the news stories also were collected, as were various demographic characteristics of victims and defendants.

The emotional items contained in the coding instrument include the number of wounds inflicted on the victim; detailed descriptions of the victim's body; negative character statements about the defendant; allegations of other crimes committed by the defendant in the past; reports of community sentiment, impact of the crime on survivors and whether there were any young children as survivors; mention of the families of both the victim and the defendant; and coders' overall judgment of the crime as reported in the article.

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<sup>164</sup>See ROBERT P. WEBER, *BASIC CONTENT ANALYSIS* (1990).

<sup>165</sup>ERICSON ET AL., *supra* note 13; GRABER, *supra* note 13.

<sup>166</sup>There are substantially more items that measure factual negative than factual positive information, consistent with prior research on pretrial publicity. Due to the fact that the analysis is limited to capital cases, however, factual positive information is subsumed by the category of mitigating circumstances.

Prior to coding any newspaper article, prospective coders were trained in the use of the coding instrument. At the first session, the coders were guided through the instrument to ensure that they understood each of the items. Then each coder completed a minimum of two test articles. Coders were blind to the sentence received by the defendant when coding the pretrial publicity content. When there were several coders being trained simultaneously, they all received the same test articles. Then the coders' responses were compared to the results obtained by one of the more advanced coders or one of the authors. In addition, there were weekly meetings to discuss any problems with a particular article or the need to add a new category or item to the instrument. Pretesting the instrument, coupled with the weekly discussions of coding consensus, increased the reliability of the content results.<sup>167</sup>

## RESULTS

Two sets of results are presented: first, descriptive statistics associated with the Kentucky Data Project, specifically, the number of pretrial articles devoted to life and death cases; second, the results of the 106 articles that have been content-analyzed.

### *Amount of Pretrial Publicity*

Table 4 presents the number of pretrial articles by sentence and year of offense. When only the life cases are considered, the range of pretrial articles is from none (for three cases) to 20, and the median is four.<sup>168</sup> In comparison, the number of pretrial articles

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<sup>167</sup>Slightly more than half of the articles ( $n = 62$ , 58.5 percent) were coded by a single person. Three additional people coded the remaining articles. The reliability of the coding was assessed by calculating Cramer's V coefficients for each item. Overall, there was perfect agreement among the coders on 76.5 percent (52 of 68) of the items. Most items measured the existence of objective issues, such as whether the defendant's prior record was reported. When the items required a subjective interpretation on the part of the coders, the reliability coefficients, not surprisingly, dropped. In particular, the average reliability coefficient was only .61 for these items. An example of one of the items requiring subjective interpretation is: "Was the portrayal of the defendant's age positive, negative, or neutral?" The low reliability on this item can be attributed to the wide range of ages of the coders themselves. Disagreements ultimately were resolved by relying on the person who coded the majority of the items.

<sup>168</sup>The median, rather than the mean, is reported due to the large range associated with the number of pretrial articles.

devoted to death penalty cases ranges from one to 81, and the median is 11. Hence, although there are substantially fewer death cases in the sample, they receive more newspaper coverage than the life cases. In fact, the correlation between sentence and number of pretrial articles is highly significant,  $r_{pb} = -.49, p < .01$ . Therefore, the assertion that death cases receive more pretrial publicity than life cases is supported by the data.

The finding that cases that result in a sentence of death receive more pretrial publicity should not be misinterpreted as indicative of a causal relationship between number of pretrial articles and sentence. Theoretically, death cases should be more heinous than life cases and thus one could expect greater attention (e.g., more stories) devoted to the former than the latter. It is important, however, to document whether different types of information are more or less likely to be reported in cases that result in life compared with death sentences.

TABLE 4: SAMPLE OF CASES FROM THE DATA PROJECT

Year	Sentence							
	Life				Death			
	Number of Cases	Total Number of Articles	Median Number of Articles	Range of Articles/Cases	Number of Cases	Total Number of Articles	Median Number of Articles	Range of Articles/Cases
1985	5	28	3	1-13	0	—	—	—
1986	11	90	5.5	0-20	2	87	N/A <sup>a</sup>	6-81
1987	7	39	7	2-8	6	119	11.5	5-56
1988	7	31	4	1-9	0	—	—	—
1989	6	32	3.5	3-13	0	—	—	—
1990	2	17	8.5	7-10	2	41	N/A <sup>a</sup>	1-40
1991	4	6	1.5	0-3	0	—	—	—
TOTAL	43	243			10	247		

Note: Three additional cases are included in the sample. Specifically, one life case from 1984 with three pretrial articles; one death case from 1984 with three pretrial articles; and one death case from 1983 with 11 pretrial articles.

<sup>a</sup>Due to the wide range of pretrial articles, reporting the median would be misleading. Moreover, the range includes the number of pretrial articles associated with these two death cases.

### ***Content Analysis of Pretrial Articles***

A subsample of 106 articles was content coded, 49 of which are based on five death cases. The remaining 57 articles come from 14 life cases.<sup>169</sup>

#### ***Demographics***

The first section of the coding instrument taps the frequency with which information on demographics is included in the articles. Such information is presented routinely in newspaper stories and thus no differences were expected between the articles devoted to life and death cases.

The age of both the defendant and the victim is usually included in the articles, mentioned in 73 percent and 88 percent of the articles, respectively. The victim's occupation/employment status (or lack thereof) is mentioned more frequently (63 percent of the articles) than that of the defendant (10.5 percent of the articles). The race of the defendant and the victim tends not to be reported explicitly, but the information can be gleaned from the occasional pictures included with the articles. For instance, the race of the defendant was mentioned in the text of two death articles (both associated with the same case) and in only one life article. Similarly, the race of the victim was mentioned in only one life and one death article. In contrast, three of the five death cases had pictures accompanying at least one of the articles. For two of these three cases, the pictures are of the defendant, either in chains ( $n = 2$  articles) or a portrait ( $n = 4$  articles). The picture accompanying the article of the other death case is of the victim's funeral. Four of the 14 life cases also had pictures accompanying the articles, but only one of these pictures was of the defendant. The remaining pictures were of a witness ( $n = 1$  article), a map ( $n = 2$  articles), and the crime scene ( $n = 1$  article).

#### ***Aggravating and Mitigating Circumstances***

Sentencing decisions in capital cases are supposed to be based on a consideration of aggravating and mitigating circumstances. For

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<sup>169</sup>The results in the following sections are presented by number and percentage of both cases and articles for comparative purposes.

death to be a possible sentence, however, the state must prove the existence of at least one aggravating circumstance. Hence, an aggravating circumstance had to exist for all the cases in our sample. We anticipated, therefore, that aggravating circumstances would be mentioned frequently in the articles, especially for cases that ultimately resulted in a sentence of death. Conversely, we expected minimal coverage of mitigating circumstances, and for such information, when it was presented, to be associated with life cases. Aggravating circumstances are factual, negative sources of information whereas mitigating circumstances are factual, positive pieces of information (from the defendant's perspective).

As predicted, aggravating factors are mentioned frequently in the articles (78 percent), especially in association with death cases (see Table 5). In particular, aggravating factors were mentioned in 92 percent of the articles associated with the death cases, and in only 67 percent of the articles associated with the life cases. In contrast, mitigating factors were mentioned in only 17 of the 106 articles (16 percent), all of which were associated with life cases. The presentation of mitigating factors did not typically come across as such to the coders (although they must have to the jurors on these cases). For instance, seven articles noted that the defendant was on drugs at the time of the crime; all of the coders noted that the defendant's use of drugs was portrayed negatively in the articles. Similarly, the infrequent mention of the defendant's use of alcohol was viewed as either negative ( $n = 1$  article) for the defendant, or neutral ( $n = 1$  article).

### ***Factual Negative Information***

The next section of the coding instrument assessed the frequency of reports of factual negative information. Again, such sources of information were expected to be more frequently mentioned in death, as compared with life, cases. As revealed in Table 5, confessions are not presented frequently in capital murder articles, occurring in only 9 percent of the articles. A defendant's prior criminal record is reported slightly more frequently in the articles than are confessions ( $n = 19$ , 18 percent). Murder convictions were presented most frequently when prior record of the defendant was mentioned ( $n = 7$ , 37 percent). Hence, the defendant's record is repeated more often in newspaper articles when it exists and is known (e.g., more articles per case mention prior record) than is a

defendant's confession. Neither type of information is presented all that frequently and thus a clear pattern is difficult to discern. Somewhat unexpectedly, however, a defendant's prior criminal record is mentioned more frequently in life ( $n = 13$ , 23 percent) than death ( $n = 6$ , 12 percent) articles.

The effect of reporting test results has not been examined in previous pretrial publicity research. It stands to reason, however, that if there is an effect it would be more likely to be negative than

TABLE 5: THE PRESENTATION OF CRIME-RELATED FACTUAL AND EMOTIONAL INFORMATION IN PRETRIAL ARTICLES

	Total		Sentence			
			Death		Life	
	Articles		Articles		Articles	
	Number	Percent	Number	Percent	Number	Percent
Aggravating factors	83	78	45	92	38	67
Mitigating factors	17	16	0	0	17	30
FACTUAL NEGATIVE INFORMATION						
Confession	10	9	6	12	4	7
Prior criminal record	19	18	6	12	13	23
Test results	47	44	16	33	31	54
Witness information	39	37	16	33	23	40
Statement of strength of evidence	23	22	6	12	17	30
Statement of guilt	39	37	20	41	19	33
Statement of sentence	18	17	5	10	13	23
Escape concerns	16	15	12	24	4	7
Security measures	19	18	16	33	3	5
EMOTIONAL						
Number of wounds	44	42	18	37	26	46
Location of wounds	34	32	10	20	24	42
Detailed description of victim's body	13	12	3	6	10	18
Negative character statement	28	26	16	33	12	21
Community sentiment	12	11	6	12	6	11
Impact on survivors	12	11	8	16	4	7
Young children as survivors	38	36	34	69	4	7
Victim's family	55	52	34	69	21	37
Defendant's family	23	22	19	39	4	7
Provokes overall negative reaction	46	43	16	33	30	53

Note: These data are based on a total of 106 articles, 49 from 4 death cases and 57 articles from 14 life cases.

positive: In most instances test results link a suspect to a crime. All the defendants in this study were convicted of capital murder and thus it seems unlikely that test results were reported that would exonerate a defendant (which would be considered factual positive information).

The results of tests are reported (or implied) in 44 percent ( $n = 47$ ) of the articles. The test most frequently reported is a coroner's report, included in nine of the death articles and 19 of the life articles. The results of ballistics tests also were reported occasionally ( $n = 14$ , 13 percent of the articles, overall). Again, contrary to expectations, the results of tests are reported in a higher percentage of life (54 percent,  $n = 31$ ) than death (33 percent,  $n = 16$ ) articles.

There are no previous attempts to examine the possible effect of reporting witness information. The data, however, suggest that such information is included in slightly more than one-third of the articles (37 percent,  $n = 39$ ), in roughly the same proportion of death (33 percent) and life (40 percent) articles.

Almost one-quarter (22 percent,  $n = 23$ ) of the articles included a statement about the strength of the evidence, and such statements were more frequent in life ( $n = 17$ , 30 percent) than death ( $n = 6$ , 12 percent) articles. Most of the articles, however, lacked specific information about what constituted the evidence. For example, in 74 percent ( $n = 17$ ) of the articles where a statement was made about the strength of the evidence, there was either not enough information provided to record an evaluation of the physical evidence ( $n = 8$ ) or there was no specific mention of any physical evidence ( $n = 9$ ). In the remaining six articles (five of which are from life cases), the physical evidence was evaluated as strong. The articles tend to mention circumstantial evidence more often (only lacking in three of the 23 cases), but still fail to provide enough information by which to make an evaluation in a substantial number of articles ( $n = 7$ , 30 percent of the 23 cases where a statement was made about the strength of the evidence). The circumstantial evidence was evaluated as strong in the remaining 13 articles that provided sufficient detail to make a judgment.

Although rarely tested in previous pretrial publicity research, statements about a defendant's guilt have been shown to have a negative effect.<sup>170</sup> Analyses of the data corroborate this finding. Statements were made about the defendant's guilt in 41 percent of

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<sup>170</sup>See Tans & Chaffee, *supra* note 37.

the death articles and 33 percent of the life articles. Somewhat intriguing is the finding that reporters were just as likely as someone from the prosecution's side to make statements about the defendant's guilt (51 percent and 49 percent, respectively). Further, reporters' statements about the defendant's guilt were in the same three death cases where someone from the prosecution's side made a comparable statement, yet the reporters injected their own opinions where none were made by someone on the prosecution's side in three life cases. As an aside, it is worth noting that there was only one mention of the defendant's possible innocence in all the articles, and it was associated with a life case, again supported by prior results.<sup>171</sup>

Given the findings regarding statements of the defendant's guilt, it is somewhat surprising to find that statements about the appropriate sentence are made in only 17 percent of the articles. (Any statement made, however, mentioned death as the appropriate sentence.) Unexpectedly, most of the statements about the appropriate sentence (72 percent,  $n = 13$ ) are made in the articles devoted to life cases. Moreover, someone from the prosecution side is most likely to be the one who makes a statement about the appropriate sentence (82 percent of the time overall).

Given the frequency of reporting statements about the defendant's guilt and the appropriate sentence, it is not surprising to find that escape concerns and security measures also are noted occasionally: Fifteen percent of the articles report escape concerns and 18 percent of the articles mention security measures. Both of these issues, however, are substantially more likely to be included in death (24 percent and 33 percent, respectively) than life (7 percent and 5 percent, respectively) articles.

### ***Emotional Items***

The coding instrument also included several items to record information that is used to sensationalize murder and thus evoke emotions in the reader. For instance, 37 percent ( $n = 18$ ) of the death articles and 46 percent ( $n = 26$ ) of the life articles report the number of wounds perpetrated on the victim. Somewhat surprisingly, the location of the wounds is mentioned more frequently in life articles

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<sup>171</sup>Tans & Chaffee found that the presentation of information favorable to a defendant was associated with not-guilty verdicts. *Id.*



(42 percent,  $n = 24$ ) than in death articles (20 percent,  $n = 10$ ). When the location of the wounds is reported, it is generally the face/head, i.e., 88 percent ( $n = 30$ ) of the time. When the location of the wounds was reported, the wounds were to the victim's head. Detailed descriptions of the condition of the victim's body tend not to be reported, occurring in only 12 percent ( $n = 13$ ) of the articles. However, a detailed description of the victim's body is reported in a higher percentage of life (18 percent,  $n = 10$ ) than death (6 percent,  $n = 3$ ) articles.

If negative statements about the defendant's character are made, these too can be considered emotional as they may increase the likelihood that readers will conclude that the defendant is the "type of person" who would commit such a crime. Stereotyping a suspect as criminal is related to guilty verdicts.<sup>172</sup> Approximately one-quarter (26 percent,  $n = 28$ ) of the articles include negative statements about the defendant's character. Fifty-seven percent ( $n = 16$ ) of these statements were made in connection with death cases. In contrast, positive statements about the defendant's character were made in only 4 percent ( $n = 4$ ) of the articles.

Another way by which negative attributions about the defendant's character are likely to be made is through allegations of other crimes committed by the defendant in the past; such allegations occur in approximately one-quarter (26 percent,  $n = 28$ ) of the articles. For instance, 14 of the 49 death articles (29 percent) include statements about other crimes possibly committed by the defendant. The crime most frequently mentioned was robbery (29 percent,  $n = 4$ ). Fourteen of the life articles (25 percent) also include allegations of other crimes committed by the defendant. The crime most frequently mentioned in the life articles is threatening behavior (43 percent,  $n = 6$ ).

Community sentiment is not mentioned routinely, occurring in only 11 percent ( $n = 12$ ) of the articles. Moreover, community sentiment is noted in an equal proportion of life and death articles. A similar pattern emerges for the reporting of the impact of the crime on survivors. Again, only 11 percent of the articles include information on the impact of the crime on survivors. There is, however, a slightly greater tendency for such information to be included in death articles (16 percent,  $n = 8$ ) than in life articles (7 percent,  $n = 4$ ).

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<sup>172</sup>Otto et al., *supra* note 19.

As noted previously, the innocence of children makes stories more appealing emotionally and reporters are right to focus on children as survivors if the intent is to elicit emotions in the reader. Slightly more than one-third of the articles (36 percent,  $n = 38$ ) note that young children are among the survivors. Sixty-nine percent ( $n = 34$ ) of the death articles mention this fact. In contrast, only four (7 percent) of the life articles note that the survivors include young children. Thus, it may be that the existence of young children as survivors contributes to the perceived heinousness of the crime.

In general, the family of the victim is mentioned more often than the family of the defendant (52 percent and 22 percent of the articles, respectively). Mention of the victim's family is included in a higher percentage death articles (69 percent,  $n = 34$ ) than life articles (37 percent,  $n = 21$ ). Moreover, as would be expected, the portrayal of the victim's family almost always is positive, and thus negative for the defendant ( $n = 46$ , 84 percent of the 55 articles in which the victim's family is mentioned).

The same pattern does not hold for the mention of the defendant's family. In particular, mention of the defendant's family is almost always associated with death cases (83 percent,  $n = 19$ ). Moreover, mention of the defendant's family occurs in 39 percent ( $n = 19$ ) of the death articles, compared with 7 percent of the life articles. Perhaps even more startling is the finding that the portrayal of the defendant's family tends to be negative ( $n = 15$ , 65 percent of the articles), especially in death cases. The defendant's family was portrayed negatively in 16 of the 19 articles (84 percent) and in a neutral manner in the remaining three articles. In fact, the defendant's family was portrayed in a positive light in only one article, associated with a life case.

The discrepancy between the portrayals of the victims' and the defendants' families is intriguing. Capital defense attorneys often argue that the best way to win a sentence of life is to humanize their clients. Are newspaper reporters frustrating this effort by presenting only negative information about a defendant's family?

In reading the articles one is struck by the pattern of information included about the victims' and defendants' families. In particular, as noted previously, the victim's family is mentioned almost two and one-half times more often than is the defendant's family, and this information is almost always positive. Conversely, the defendant's family, when it is mentioned at all, tends to be implicated in the crime. For instance, in one case the defendant's wife was not

charged with murder, but she did face charges of using the victim's credit cards. In another case, the defendant's mother had taken him to a store near where the murder occurred; she is quoted as saying that she believed her son was "watching the area." The headline accompanying the article is: "Suspect had staked out murder scene, police say."

Another noticeable difference between the portrayals of the victims' and defendants' families is in terms of information concerning children of the defendant. There is no way of knowing whether the majority of defendants represented in this sample did not have children or whether the reporters consciously decided not to report such information. Regardless of the reason, few defendants are associated with having children. Furthermore, when the defendants' children are mentioned, more often than not the information contributes to a negative view of the defendant. For example, one of the articles mentions that the defendant "forced" his second wife, from whom he was estranged, off the road and took their child. The existence of the child in this story does little to elicit sympathy for the defendant, which is in contrast with the manner in which children of victims tend to be portrayed.

Finally, coders were asked to record their overall judgment of the crime as reported in the article. In particular, the item asks whether the article provokes an emotional reaction to the defendant, and if so, in what way. Almost half of the articles (43 percent,  $n = 46$ ) provoked a negative emotional reaction in the coders. (Only one article evoked a positive reaction to the defendant.) Interestingly, 53 percent of the life articles ( $n = 30$ ) compared with only 33 percent ( $n = 16$ ) of the death articles provoked negative reactions to the defendant in the coders.

Overall, the results suggest a difference in the presentation of information included in pretrial newspaper accounts of life and death cases. In particular, using 20 percentage points as an indication of a substantial difference, pretrial newspaper stories associated with death articles are more likely to report the existence of aggravating factors, security measures, the existence of young children as survivors and the families of both the victim and the defendant. In comparison, life articles are more likely to report the existence of mitigating factors, test results, location of wounds and the life articles were more likely to provoke an overall negative reaction among the coders. Hence, capital cases that result in a death sentence are likely to appeal to the enormous sense of loss

that accompanies murder. The defendants in these cases, moreover, are portrayed as requiring added security measures, which implies that the safety of others is in jeopardy. Additional research has documented that capital jurors' perceptions of possible future wrongdoing are associated with votes for death.<sup>173</sup> The finding that the life articles evoked a more negative reaction among the coders than did the death articles was surprising and not anticipated. One possible explanation is that the coders, most of whom were advanced undergraduate and graduate criminal justice students, overcompensated in their evaluations; they may have striven not to be influenced by the emotional types of information presented in the death articles.

## CONCLUSION

The effects of media coverage on criminal justice case processing, juror decision making and public opinion is difficult to document. The difficulty arises from the inability to dissect the effects of the news media from other potential influences on case outcomes. The media are but one influence on how the public constructs reality.<sup>174</sup> This study cannot conclude that the media have a direct effect on capital jurors' or any criminal justice participants' behavior. The effects of pretrial publicity, media coverage and other issues such as cameras in the courtroom are much more complex than this. After reviewing existing research, there seems to be enough evidence to support the conclusion that pretrial publicity has both indirect and subtle influences on various criminal justice decision points.

This research shows that media coverage of the criminal justice system is an important source of information for prosecutors, judges and jurors that interacts with other possible influences (e.g., conversations, life experiences, case specific factors).<sup>175</sup> Past research concludes that crime receives frequent and prominent news coverage, the public enjoys watching and reading stories about crime and

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<sup>173</sup>See William Bowers, *The Capital Juror Project: A Preview of Coming Attractions*, 70 IND. L.J. 1043 (1995).

<sup>174</sup>See GAYE TUCHMAN, *MAKING NEWS: A STUDY IN THE CONSTRUCTION OF REALITY* (1978); RICHARD QUINNEY, *THE SOCIAL REALITY OF CRIME* (1970); David Altheide, *TV News and the Social Construction of Justice: Research Issues and Policy*, in *JUSTICE AND THE MEDIA* 292 (Ray Surette ed., 1984).

<sup>175</sup>See TUCHMAN, *supra* note 174; QUINNEY, *supra* note 174; Altheide, *supra* note 174.

the media sensationalize specific crime incidents.<sup>176</sup> The data presented here document that prejudicial information is included in a substantial percentage of newspaper accounts of crime. Aggravating factors, the wounds inflicted on the victim and child homicide survivors are items frequently presented as newsworthy information in capital cases. Moreover, the majority of existing research, especially carefully controlled laboratory experiments, concludes that potential jurors can be influenced by specific and general information included in newspaper and television crime stories.

Researchers should continue attempts to discover the adverse and positive effects media coverage may have on trial outcomes. There remain numerous unanswered questions about the types of prejudicial information most likely to bias capital jurors' decisions. For example, this content analysis indicates that potentially prejudicial publicity, such as mention of the victim's family and aggravating factors, are presented frequently in the news. The prejudicial effects of these important areas have been neglected in past experimental research. Moreover, emotional pretrial publicity has been less thoroughly examined when compared to empirical knowledge on factual publicity, although research results indicate that this information is presented frequently in the news and that the potential for bias is substantial. Future research needs to struggle with various types of emotional publicity to document more clearly the effects of this prejudicial information.

Most of the research on pretrial publicity has been produced in laboratory settings. This research has made important contributions to knowledge of the prejudicial effects of pretrial publicity. The studies have usually exposed mock jurors to various types of prejudicial news coverage and then compared the effects of that coverage with those in a control group. The design of these studies, of course, is most appropriate for drawing conclusions about causal relationships between pretrial publicity and mock juror outcomes, but at the expense of external validity. Hence, the generalizability of these studies is limited because of the artificiality of the publicity presented, the short time lags between exposure to publicity and rendering of verdicts and the unrealistic nature of laboratories compared with courtrooms.<sup>177</sup> Researchers have recognized the need

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<sup>176</sup>See CHERMAK, *supra* note 13; SURETTE, *supra* note 48.

<sup>177</sup>See Surette, *supra* note 48; DON R. PEMBER, MASS MEDIA LAW 361-62 (1996); Ronald C. Dillehay & Michael T. Nietzel, *Constructing a Science of Jury Behavior*, in REVIEW OF PERSONALITY AND SOCIAL PSYCHOLOGY 246 (L. Wheeler ed., 1980).

to examine the prejudicial news effects in actual cases. For example, Carroll and others concluded that an "excellent starting point" for future research "would be research employing realistic cases, publicity, and involved parties."<sup>178</sup> The existing survey research mentioned earlier has attempted to accomplish this goal, although it is limited because it only tests the memories of potential jurors rather than linking the publicity to actual case results. Future research needs to examine the role of prejudicial news items in actual cases.

The struggle to find a balance between free press and fair trial rights has not been without significant insights, although in many ways empirical knowledge on pretrial publicity is in its infancy. This call for additional research is particularly important because of the continuing expansion of news into various forms and the significant harms that might accrue from an ineffective balance of these rights. This article does not argue that news organizations should be refused access to criminal justice organizations or should be precluded from providing the public with information about crime. Without such oversight, the goals of democracy might be easily subverted. Future research, however, must continue to dissect whether such media access affects other important freedoms. A defendant's right to a fair trial should not be compromised by the premature dissemination of prejudicial information.

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<sup>178</sup>Carroll et. al, *supra* note 10, at 196.